a charge of murder it is not permissible to convict of theft. The passage in the textbook reads as follows :—

"**Murder and theft.** — This section and section 236 refer to cognate offences, but do not relate to offences of so distinct a character as murder and theft. Where, therefore, a person charged with murder, was acquitted of that offence, but convicted of theft with reference to the provisions of this section; the conviction was altogether unwarranted, 1888 A.W.N., 95."

With this view we agree, and we are, therefore, of opinion that the 2nd appellant should not in the present case have been convicted of robbery, having been charged only with murder.

We would add that in the present case the facts proved were consistent either with robbery in the course of which the victim was killed or with the complete crime of murder followed by simple theft. The offence of robbery, therefore, was not strictly proved.

For these reasons we quashed the conviction of the 2nd appellant.

Order accordingly.

PUBLIC PROSECUTOR v. AHMAD BIN DIN

[Cr. R. J. (Thomson J.) August 30, 1956]

[Ipoh — Criminal Revision No. 19 of 1956]

Criminal Procedure — Magistrate holding Inquiry of death under Chapter XXXII of the Criminal Procedure Code (Cap. 6) — Whether competent to direct prosecution or order accused person's arrest for negligent driving.

Trial — Whether trial before the same Magistrate who had already judicially announced his belief in accused's guilt permissible.

On April 9, 1956, the accused in this case was driving a motor van when it collided with a bicycle as a result of which collision the rider of the bicycle sustained injuries from which he died a few days later. On July 30, 1956 the Magistrate at Teluk Anson held a Death Inquiry under Chapter XXXII of the Criminal Procedure Code (Cap. 6). After the accused (1st witness at the inquiry) had given his account of what had happened, the Magistrate announced: "I do not require to hear any more evidence." He then proceeded to record what he called a "verdict" in the following terms: "Misadventure caused by the negligent act of Ahmad bin Din. I direct that Ahmad bin Din be arrested and charged with negligent driving." In pursuance of this direction the accused was arrested and on the following day he appeared before the same Magistrate. He pleaded guilty and was convicted and fined $75 and had his driving licence endorsed.

Held on revision: (1) the Magistrate in this case had no power to direct the prosecution of the accused for any offence and in any event he had no power to direct the accused's arrest on a charge of negligent driving; (2) the trial in this case amounted to a miscarriage of justice: it cannot be said that justice is manifestly and undoubtedly seen to be done when an accused person appears for trial before a Magistrate who has already judicially announced his belief in his guilt.

Observations on the charge of negligent driving.

Case referred to —

(1) *R. v Sussex Justices* (1924) 1 K.B. 256, 259.

CRIMINAL REVISION.

Thomson J. : — The accused in this case has been convicted in circumstances which in my judgment call for the intervention of this Court.

On 9th April, 1956, the accused was driving a motor van on the Teluk Anson/Bagan Datoh Road when it collided with a bicycle as a result of which collision the rider of the bicycle sustained injuries from which he died a few days later. There were at least five persons who could throw light on this occurrence. These were the accused, a passenger in his van who took the injured cyclist to hospital, the hospital medical officer, a police officer who visited the scene the same evening and the driver of a bus which the accused was in the act of passing at the time of the accident.

On 30th July. 1956, the Teluk Anson Magistrate proceeded to hold a Death Inquiry under Chapter XXXII of the Criminal Procedure Code. The conduct of that Inquiry is not something which concerns this Court. It is something which concerns the Public Prosecutor. Nevertheless, I am compelled to consider the proceedings at it by reason of the light which they throw upon what happened subsequently.

The first witness to be called was the accused who gave his account of what had happened. I do not find it necessary to discuss his story in detail but the impression — and it is a firm impression — that is left in my mind after reading it is that it did not amount to an admission of or shew an intention to admit anything more than an error of judgment.

The Magistrate, however, would seem to have regarded it in a different light and, as soon as he had heard it, announced "I do not require to hear any more evidence". He then proceeded to record what he calls a "verdict" in the following terms :—

"Misadventure caused by the negligent act of Ahmad bin Din.

I direct that Ahmad bin Din be arrested and charged with negligent driving."

It is not for me to deal with the adequacy or the correctness of these proceedings. That is a matter for the Public Prosecutor. And in that connection the Public Prosecutor has adequate powers. Nevertheless, I must point out in the first place that the Magistrate had no power to direct the prosecution of the accused for any particular offence or indeed at all (that was a matter for the Public Prosecutor) and in the second place that in any event he had no power to direct the accused's arrest on a charge of negligent driving. It may be that in the circumstances he had power to order his arrest on a charge under section 304A of the Penal

Code. But negligent driving is not an offence for which a warrant can issue in the first instance.

Apparently the accused was arrested in pursuance of this direction and was released on bail.

The following day he appeared before the same Magistrate on a complaint by the Police Inspector who had assisted at the Death Inquiry on the following charge :—

"That you on 9.4.56 at or about 7.30 p.m. at 18½ mile Bagan Datoh Road, Teluk Anson, being the driver of motor van PA. 3090, did drive the said motor van in a negligent manner to wit, by knocking into a cyclist, and that you thereby committed an offence under section 4(2) and punishable under section 13 of the Motor Vehicles (Driving Offences) Proclamation G.N. 151/46."

The Magistrate instead of adjourning the matter for trial before another Magistrate proceeded to take his plea and, perhaps not unnaturally in the light of what had happened the previous day, the accused pleaded guilty. On that he was convicted and fined $75 and had his driving licence endorsed.

So far as the trial is concerned it may be that nothing was done that was technically wrong and clearly, on the face of it at any rate, nothing was done to which the accused himself did not consent. Nevertheless, I am satisfied that the whole thing amounted to a miscarriage of justice. The previous day the Magistrate had announced that he had come to a judicial finding that what the accused had done amounted to causing death by a negligent act and ordered his arrest. In the circumstances it would have taken a man of extraordinary hardihood and resolution however conscious he might have been of his innocence to do otherwise than plead guilty when the following morning he found himself in the dock before the same Magistrate on a less serious charge in respect of the same accident. That consideration alone would justify me in saying that he did not have a fair trial.

Let me make it clear that there is no room for any shadow of a suggestion that the Magistrate was in any way consciously unfair. The accused came from Penang and it may well be that the Magistrate felt he was shewing him consideration in enabling him to have his troubles over and done with and to be on his way home. All the same, to quote the classical words of Lord Hewart C.J. in *R. v. Sussex Justices*[1], it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". And it cannot be said that justice is manifestly and undoubtedly seen to be done when an accused person appears for trial before a Magistrate who has already judicially announced his belief in his guilt.

There is, too, the further consideration that the charge was of an extremely objectionable and misleading nature, one of a sort I have criticised on previous occasions but which still seems to be in use.

In a criminal charge of negligent driving it is not either usual nor necessary to set out particulars of the alleged negligence. It is, however, grossly misleading to say "You did drive the said motor van in a negligent manner, to wit, by knocking into a cyclist". 'Knocking into' a cyclist is in itself a perfectly colourless action from the legal point of view. It may be wrong or it may be excusable. It all depends on the circumstances of the case. The point is that it does not of itself constitute negligence and the fact of alleging it is calculated to mislead the accused person by detracting his attention from the true nature of the allegation against him which is that he drove his vehicle negligently. It is the negligent driving and not the 'knocking into' a cyclist that constitutes the offence which the accused is called upon to admit or not admit and which if he does not admit it the prosecution is called upon to prove.

The conviction is set aside. The fine paid will be refunded and the endorsement on the accused's licence cancelled. There will be an order for a re-trial on such charge as the Public Prosecutor may direct and that re-trial will be before another Magistrate.

Re-trial ordered.

PUBLIC PROSECUTOR v LIM CHAI SENG & ORS.

[Cr. R. J. (Thomson J.) August 31, 1956]

[Ipoh — Criminal Revision Nos. 20, 21, 22, 23 & 24 of 1956]

Criminal Law — Charge of "failing" to attend a Magistrate's Court in answer to a summons — Criminal Procedure Code (Cap. 6), s. 359 — Whether trial before the same Magistrate before whom accused failed to attend permissible — Charge sheet.

In each of these cases the accused was charged with "failing" to attend the Magistrate's Court in answer to a summons which was alleged to be a contravention of section 174 of the Penal Code. In each case the accused pleaded guilty and, although no conviction appeared on any of the records, was fined. It appeared that the Magistrate before whom the accused failed to attend was in each case the same Magistrate who later tried them on these charges.

Held on revision: (1) "failing" to attend a Magistrate's Court in answer to a summons is not an offence. The offence is to "intentionally omit" to attend; (2) the trial of the accused in these cases was in direct contravention of section 359 of the Criminal Procedure Code (Cap. 6), the provisions of which are mandatory, and therefore the Magistrate in question had no jurisdiction.

Observations on particulars required to be entered on the Charge Sheet.